On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunale di Genova by order of 31 October 1975, hereby rules:

(1) The 'day of importation' referred to in Article 17 of Regulation No 19 and of Article 15 of Regulation No 120/67/EEC is the day on which the import declaration for the goods is accepted by the customs authorities.

(2) For the reasons set out above the Recommendation of the Commission of 25 May 1962 concerning the date to be taken into account in determining the rate of customs duty to be applied to goods declared for internal consumption cannot apply to levies.

Lecourt Kutscher O'Keeffe

Mertens de Wilmars Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 15 June 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 26 MAY 1976

My Lords,

As Your Lordships remember, the system of levies on imports instituted by Council Regulation No 19 on the gradual establishment of a common organization of the market in cereals entered into force on 1 July 1962. It continued in force until 1 July 1967 when it was replaced by the new system

instituted by Council Regulation No 120/67/EEC on the common organization of that market.

Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67 provided that, except where the levy was fixed in advance, the amount of the levy to be charged should be that 'applicable on the day of importation'. In this case, which comes to the Court by way of a reference for a preliminary ruling by the Tribunale of Genoa, the main question for decision is as to the meaning of 'the day of importation' in that context.

The plaintiff before the Tribunale of Genoa, Signor Giordano Frecassetti, is the proprietor of a firm called 'L'Agricola' which trades in cereals. Between May 1967 and March 1968 (that is during a period overlapping the periods of application of Regulation No 19 and Regulation No 120/67) L'Agricola imported into Italy by sea, via the port of Genoa, a total of ten consignments of maize, each of which was cleared through customs by instalments according to a special procedure laid down by Italian legislation and which was described to us at the hearing.

It seems that the practice in Italy (and both the defendant, which is the Amministrazione delle Finanze dello Stato, and the Commission have contended that that practice was correct) has been to charge levy in general at the rate applicable on the day of the acceptance by the Customs authorities of the customs entry, but, if the rate of levy is reduced between that day and the day when the goods are released by the Customs for free circulation, to permit the importer to pay the lower rate applicable on the latter day. It seems however that, in the present case, owing to what the defendant says was a mistake on the part of the Customs at Genoa, L'Agricola paid levy on some of the batches of maize in question at an even lower rate applicable on a date falling between that of acceptance of the entry and that of release of the goods. As I understand it, this date was that of an application for the release of the goods made pursuant to the special procedure that I have mentioned.

Following the discovery of the 'mistake', the plaintiff received from the Customs an assessment to additional levy. It is against that assessment that he now appeals to the Tribunale.

By its order for reference dated 31 October 1975, the Tribunale asks the Court to rule on —

(1) The interpretation of the phrase 'the day of importation' in Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67 with particular reference to a case where goods are cleared through customs by instalments and where there has been a change in the rate of levy between the date of the customs entry and the date when a particular batch is cleared through customs; and

(2) The interpretation of a Recommendation addressed by the Commission to the Member States on 25 May 1962 relating to the relevant date for determining the rate of customs duty applicable to goods entered for home use.

The Tribunale asks whether that recommendation is applicable in relation to levies as well as in relation to customs duties.

I think it convenient to deal with this second question first.

The recommendation to which it refers was made under Article 27 of the EEC Treaty, which is to be found in the section of the Treaty providing for the 'Setting up of the common customs tariff'. Article 27 provides —

'Before the end of the first stage, Member States shall, in so far as may be necessary, take steps to approximate their provisions laid down by law, regulation

or administrative action in respect of customs matters. To this end, the Commission shall make all appropriate recommendations to Member States.'

There is no authentic English text of the Recommendation, so I refer to the French.

The object of the Recommendation was thereby expressed to be 'd'assurer une incidence égale des droits du tarif douanier commun dans tous les États membres'. It recited that —

'Du fait que la procédure du dédouanement des marchandises déclarées pour la consommation s'étale souvent sur plusieurs jours, et que le taux du droit de douane prévu à leur égard est susceptible de varier durant ce laps de temps, il y a lieu, notamment, de fixer avec précision quelle date il convient de prendre en considération pour la détermination du taux du droit de douane applicable aux dites marchandises'.

It then prescribed 'les règles qu'il y aurait lieu de substituer dans l'ensemble de la Communauté aux règles nationales en vigueur en la matière, qui sont fort différentes d'un État membre à l'autre' (JO of 29. 6. 1962, p. 1545).

The general rule was prescribed by paragraph I of the Recommendation and was that —

"... le taux du droit de douane applicable aux marchandises déclarées pour la consommation est le taux en vigueur à la date à laquelle le service des douanes accepte l'acte par lequel le déclarant manifeste sa volonté de procéder à la mise à la consommation desdites marchandises" (JO of 29. 6. 1962, p. 1545).

The general rule was subject to a number of exceptions of which one (contained in paragraph II) was expressed as follows:

'Lorsqu'un abaissement du taux du droit de douane applicable à une marchandise déclarée pour la consommation intervient après la date visée au paragraphe I ci-dessus, mais avant que l'autorisation d'enlèvement de ladite marchandise ait été donnée par le service des douanes, le déclarant a la faculté de réclamer l'application de ce taux plus favorable' (JO of 29. 6. 1962, p. 1546).

It seems that what was thus recommended coincided with what was already the practice in Italy, though not, at that time, in all Member States. It also seems that, as I have indicated, the same practice has been applied in Italy (and also in the Federal Republic of Germany, though not in other Member States) in relation to agricultural levies.

It was submitted on behalf of the defendant that the question referred to the Court by the Tribunale about the recommendation was inadmissible, on the ground that the Court had no jurisdiction under Article 177 of the Treaty to rule on the interpretation of recommendations. The argument in support of that submission was briefly that, since by virtue of Article 189 of the Treaty a recommendation has no binding force, its interpretation could not be relevant to the decision of any question at issue before a national Court.

I would reject that submission. In contrast with Article 173 of the Treaty which provides that "The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions", Article 177 confers on the Court "jurisdiction to give preliminary rulings concerning ... the validity and interpretation of acts of the institutions of the Community" without any qualification. It is thus clear, in my opinion, that the reference to 'acts' in Article 177 includes recommendations. Moreover I do not think it correct to say that the interpretation of a recommendation can never be relevant to a

question at issue before a national Court. Where, for example, a national statute has been passed for the express purpose of giving effect to a recommendation the correct interpretation of that statute may well depend on that of the recommendation. Whether it does so depend or not is a matter for the national Court concerned. The position in this regard is, I think, analogous to that obtaining in regard to directives, as to which see Case 32/74 *Haaga's* case [1974] ECR 1201. The circumstance that directives are binding on Member States whereas recommendations are not cannot in my opinion make any material difference.

I turn then to the substance of the question.

In my opinion the answer to it must be that the recommendation of the Commission of 25 May 1962 does not apply in relation to agricultural levies.

So far as the Treaty is concerned, authority for the imposition of such levies is not to be found in the Articles providing for the setting up of the common customs tariff, of which, as I have mentioned, Article 27, under which the recommendation was made, is one. Such authority is to be found in a different part of the Treaty, that dealing with agriculture, and in particular in Articles 40 to 43. The interpretation of phrases used in Council Regulations adopted under those Articles must be purely a matter of Community law. It cannot be a matter in which there is any room for the 'approximation' pursuant to recommendations of the Commission of the "provisions laid down by law, regulation or administrative action" in the different Member States. In other words, the concept of "the day of importation" in Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67 must be a concept of Community law having the same meaning, the same content, in all Member States. So much indeed was, I think, decided by this Court in Case 35/71 *Schleswig-Holsteinische Hauptgenossenschaft* v *Hauptzollamt Itzehoe* (Rec. 1971, p. 1094).

So I come back to the first question referred to the Court by the Tribunale of Genoa, which is, briefly: what is the meaning of 'the day of importation' in those Articles?

At first sight it might seem that that decision had also been decided in Case 35/71, where the Court held that the rate of levy applicable must be that in force 'on the date on which the goods are irrevocably put into free circulation'.

The parties and the Commission were however unanimous in submitting that the question with which the Court was dealing in that case was different from that which arises here. The importer in Case 35/71 had taken advantage of a procedure available at the time in the Federal Republic of Germany under which goods might be stored in 'deferred duty warehouses' for long periods without payment of customs duty, although they had otherwise been cleared for free circulation. Essentially the question in that case was whether a provision of German law under which the rate of levy to be charged on such goods was that applicable when they were removed from the warehouse was consistent with Article 15 of Regulation No 120/67, or whether 'the day of importation' in that Article connoted some earlier time before the goods were placed in the warehouse.

I agree that that was a different question and I observe that the Court expressly limited its ruling in Case 35/71 to goods in deferred duty warehouses. Moreover the Court cannot in my opinion have intended to rule that the rate of levy to be charged should be that in force on a day subsequent to that on which the levy became payable.

Two other decisions of the Court were cited in argument.

Of these, the first, Case 186/73 *Fleischkontor* v. *Einfuhr- und Vorratsstelle für Schlachtvieh* [1974] ECR 533, was concerned with the interpretation of Article 15 of Commission Regulation No 1373/70, which laid down precisely when an importer should be deemed to have imported goods covered by an import licence, for the purpose of determining whether he had imported them during the period of validity of the licence so as to be entitled to the release of the security deposited by him to guarantee such importation. Paragraph (6) (a) of Article 15 provided in effect that the obligation to import should be considered to have been fulfilled on the day –

'on which the customs authorities accept the document by which the declarant states his intention to put the products in question in free circulation or, where the products may be put in free circulation without such statement of intention, the day on which the products were put in free circulation.'

There is however no suggestion that the provisions of Article 15 of Regulation No 1373/70 apply for the purpose of determining 'the day of importation' by reference to which the rate of levy is to be ascertained. Nor indeed was that Regulation in force at the time of the importations in question in the present case. So, in my opinion, Case 186/73 affords us no assistance.

The other decision is that in Case 3/74 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v. *Pfützenreuter* [1974] ECR 589. There again the question was whether certain importations had been effected during the period of validity of the relevant licence. But the facts arose before the entry into force of Regulation No 1373/70, so that the question had to be answered on the basis of general principles. The Court held that it was enough, to satisfy the requirement of importation during the period of validity of the licence, that the goods should have crossed the frontier of the importing country within that period, such crossing being 'duly recorded by the competent customs authorities', 'provided that it is also established that the goods were subsequently given customs clearence and put into free circulation'.

It is tempting to deduce from that decision the proposition that in general 'importation' occurs when goods enter the territory of the importing country. In my opinion, however, that is not an adequate test, at all events for the purpose of fixing the rate of levy, if only because it is too vague. For instance, would it, in the case of an importation by sea, mean that importation occurred when the ship carrying the goods entered the territorial waters of the importing State, or when that ship came within the limits of a port (the test prescribed by the United Kingdom Customs and Excise Act 1952, s. 79) or when the goods were unloaded from the ship? Obviously these events could all take place on different days.

It seems to me that, in interpreting the phrase 'day of importation' in Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67, one must have in mind the following considerations:

(1) the day in question must be readily ascertainable;
(2) it must be so ascertainable in all cases and in all Member States;
(3) it must be such as to enable the rate of levy applicable to be determined before the levy becomes payable – as to this I do not overlook the special procedure that I have already mentioned applicable in Italy at the option of the importer in a case such as the present, and which involves a deposit by him of the estimated levy due plus 10% and a final reckoning after all the goods have been cleared through customs, but the authors of the Regulations cannot be taken to have envisaged that such a procedure would be adopted in all cases;

(4) the definition of that day must be consistent with the decision of the Court in Case 35/71, i.e. it must, in the case of goods entered for warehousing, allow for the determination of the amount of the levy on the basis of the rate applicable at the time of their removal from the warehouse — I observe that that principle is enshrined not only in that decision but also in Article 10 of Council Directive 69/74/EEC of 4 March 1969 on 'the harmonization of provisions laid down by law, regulation or administrative action relating to customs warehousing procedure'.

The defendant and the Commission were at one in submitting that the Court should define 'the day of importation' as being, in general, that on which the customs authorities accept the document by which the importer declares his intention to put the goods into free circulation, a definition which echoes that in paragraph I of the recommendation of 25 May 1962 and also, in part, that in Article 15 (5) (a) of Regulation No 1373/70.

There is however reason to doubt whether that definition would be entirely satisfactory. Your Lordships will remember that Article 15 (5) (a) of Regulation No 1373/70 went on to deal with cases 'where the products may be put in free circulation without such statement of intention'. This suggests that the definition proposed by the defendant and the Commission could not be applied in all cases. I therefore prefer the formulation proposed by the plaintiff, which refers simply to the day of acceptance by the customs authorities of the customs entry. Probably in most cases the two formulations mean the same thing.

The real dispute between the parties is as to the extent to which an importer should be allowed to benefit from a reduction in the rate of levy occurring after that day.

My opinion is that he is not entitled to benefit from such a reduction at all. As was explained by the Commission, the practice of allowing importers to benefit from such reductions had its origin in the procedures applicable for the purpose of customs duties in some of the Member States (including Italy) and which were reflected in paragraph II of the recommendation of 25 May 1962. In my opinion it is wrong to apply that practice to agricultural levies, for two reasons.

First, the phrase 'the day of importation' in Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67 points to a single day. It does not point to a choice of days.

Second, to allow an importer to pay levy at a rate lower than that applicable on the day of importation may defeat the purpose of the levy. That purpose, Your Lordships remember, is to render it uneconomic for traders to sell imported goods in the Community at prices lower than those sought to be maintained by the Common organization of the market. With that purpose in view the rates of levy are fixed periodically so as to reflect the difference between prices in the world market and Community prices. In practice the only thing that can bring about a reduction in the rate of levy is an increase in world prices. Thus a reduction in the rate of levy occurring after the date of a particular importation can only be due to a rise in world prices occurring after that date. But there is no reason to suppose that that rise will be reflected in the price paid by the importer for the goods. Thus to charge the importer only the reduced rate of levy may render it profitable for him to sell them below the Community price.

I accept that, at first sight, that reasoning seems equally applicable to goods

entered for warehousing. But I believe that such goods are often the subject-matter of sub-sales whilst they are in the warehouse so that the ultimate importer may well pay the current world price for them.

In the result I am of the opinion that the questions referred to the Court by the Tribunale of Genoa should be answered as follows:

(1) Save in the case of goods entered for warehousing, the 'day of importation' referred to in Article 17 of Regulation No 19 and Article 15 of Regulation No 120/67 is the day upon which the Customs authorities accept the relevant customs entry, regardless of whether the goods are cleared through customs in one lot or by instalments and regardless of whether there is any subsequent change in the rate of levy.

(2) The recommendation of the Commission of 25 May 1962 relating to the relevant date for determining the rate of customs duty applicable to goods entered for home use does not apply in respect of Cummunity agricultural levies.